Supreme Court, U.S.
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No. _____ 10-311

In The

Supreme Court of the United States

ADVANCED TOWING COMPANY LLC,
ROADRUNNER WRECKER SERVICE, INC.,
and KINGS TOWING, INC.,

Petitioners,

vs.

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Fairfax County Virginia Ordinance imposing a geographical limitation in its private property towing provisions violates the equal protection rights of the Petitioners as are secured by the Fourteenth Amendment to the Constitution of the United States.

PARTIES TO THE PROCEEDING

Petitioners are Advanced Towing Company LLC, Roadrunner Wrecker Service, Inc., and Kings Towing, Inc. who were the Petitioners in the Court below. Respondent is Fairfax County, Virginia.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the following information is hereby disclosed: Advanced Towing Company LLC is a privately held Limited Liability Corporation in the Commonwealth of Virginia. It has no parent corporations nor any publicly owned stock. Roadrunner Wrecker Service, Inc. is a privately held Virginia Corporation. It has no parent corporations nor any publicly owned stock. Kings Towing, Inc. is a privately held Virginia Corporation. It has no parent corporations nor any publicly owned stock.

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PETITION FOR A WRIT OF CERTIORARI

THE PETITIONERS respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is appended. (Pet. App. 1-9)

The Trial Court's Rulings are appended. (Pet. App. 10-13)

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

BASIS OF THE CONSTITUTIONAL CHALLENGE

Constitution of the United States, Amendment XIV Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Fairfax County, Virginia, enacted an ordinance pursuant to the authority granted it by the legislature (§46.2-1232, Code of Virginia, 1950, as amended) regulating the towing of trespassing vehicles which provides, in pertinent part:

> 82-5-32(e) "Every site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle [impounded in Fairfax County] to storage site located within the boundaries of Fairfax County."

On September 11, 2008, the Petitioners filed a declaratory judgment action pursuant to §8.01-184, Code of Virginia, 1950, as amended against Fairfax County seeking a determination that the ordinance was enacted in violation of the Petitioners' rights as secured by the Fourteenth Amendment to the Constitution of the United States.

The Complaint alleged:

1. The Petitioners are corporations authorized to conduct business in the Commonwealth of Virginia and engage in the business of, *inter alia,* removing

trespassing vehicles from private property pursuant to §46.2-1231 Code of Virginia, 1950, as amended.

2. Respondent Fairfax County Board of Supervisors is the governing body of Fairfax County. Fairfax County comprises a geographical territory of over 400 square miles.

3. Petitioner, Advanced Towing Company LLC has its principal place of business and vehicle storage facility in Arlington County, Virginia; Petitioner Roadrunner Wrecker Service, Inc. has its principal place of business and vehicle storage facility in Loudoun County, Virginia; and Petitioner King's Towing Inc. has its principal place of business and vehicle storage facility in the City of Fairfax, Virginia.

4. Petitioner Advanced Towing Company LLC, is located within three miles from the Fairfax County line.

5. Petitioner Roadrunner Wrecker Service, Inc. is located within five and one-half miles of the Fairfax County line.

6. Petitioner King's Towing Inc. is located within one-half mile of the Fairfax County line, in the City of Fairfax, a jurisdiction of six square miles completely surrounded by Fairfax County.

7. Several property management companies contract with the Petitioners to enforce parking policies on company properties and to remove trespassing vehicles from properties located in Fairfax County.

8. Trespassing vehicles removed from the properties set forth above would be towed to the Petitioners' respective vehicle storage facilities in Arlington and Loudoun Counties, and the City of Fairfax respectively.

9. The Fairfax County Board of Supervisors has adopted a geographical limitation upon towers as part of the County Code in Section 82-5-32(e):

> "Every site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County."

10. In order to fulfill their contractual obligations pursuant to contracts identified in paragraph (7) above, the Petitioners would be subjected to possible prosecution for the violation of the Fairfax County Code Section set forth in paragraph (9) above.

11. The ordinance provision set forth above in paragraph (9) establishes an unconstitutional classification which impermissibly draws an unfair distinction between towers who have a storage facility in Fairfax County and towers who do not have a storage facility in Fairfax County.

12. The unreasonable, arbitrary and unconstitutional classification/distinction set forth in the ordinance results in severe adverse economic consequences upon your Petitioners, and upon other towers who do not have a storage facility in Fairfax County.

13. The said pernicious classification constitutes an unconstitutional residency requirement upon those "out of County" towers who would seek to conduct business in Fairfax County.

14. The geographical limitation set by Fairfax County bears no rational relationship to any proper governmental objective and violates the equal protection rights of the Petitioners as are secured by the Fourteenth Amendment to the Constitution of the United States and Article I §11 of the Constitution of Virginia.

15. The foregoing facts establish an actual controversy between the parties.

The Respondent County filed a demurrer that went to the merits of the case: without the provision it would be unable to enforce the ordinance.

The Petitioners responded, on the merits of the case, that the enforcement of a local ordinance outside the confines of the enacting jurisdiction was specifically envisioned and provided for by the state legislation: "In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply." Virginia Code §46.2-1232, Code of Virginia, 1950, as amended. The Petitioners also proffered agreements entered into between Fairfax County and juxtaposed jurisdictions that provided for the authority of local juxtaposed law enforcement agencies to exercise authority outside of Fairfax County.

On February 13, 2009, the Court heard argument on the second demurrer and sustained the same, ruling that " . . . here the Fairfax County Board of Supervisors has implemented a very reasonable regulation that is rationally related to governmental purposes, legitimate governmental purposes and for that reason, the demurrer should be sustained."

The Petitioners filed a motion to reconsider, which was heard by the Court on March 13, 2009 and was denied.

From this ruling, the Petitioners appealed to the Supreme Court of Virginia. The Supreme Court of Virginia affirmed the trial court's ruling in a written opinion handed down on June 10, 2010.

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Virginia is in direct conflict with a decision of the Court of Appeals of Maryland in *Verzi v. Baltimore County Maryland*, 635 A.2d 967, 333 Md. 411 (1993) Court of Appeals of Maryland.

In the present case, the Amended Complaint alleged: first, that the County has drawn a distinction between "in County" towers and "out of County" towers; that the distinction alleged bears no rational relationship to any proper governmental objective and violates the equal protection rights of the Petitioners as are secured by the Fourteenth Amendment

to the Constitution of the United States; and that the operation of the Petitioners' respective businesses would subject them to prosecution for violation of the ordinance.

Legislated geographical limitations have been subject to extensive litigation under equal protection challenges in Maryland. The Fairfax County Ordinance under review here, is essentially, a residency requirement.

In *Verzi v. Baltimore County Maryland,* 635 A.2d 967, 333 Md. 411 (1993) Court of Appeals of Maryland, the Court observed that "[a]lthough we have traditionally accorded legislative determinations a strong presumption of constitutionality [citations omitted] we have also required that a legislative classification rests upon 'some ground of difference having a fair and substantial relation to the object of the legislation'" [citations omitted] *Verzi, id.* at p. 419.

The present case is factually indistinguishable from the case of *Verzi.* There, the Appellant had been denied a defined tow area assignment for the "sole reason that his business [was] not in Baltimore County" *id.* at p. 425. The Court defined its duty as: "In applying the rational basis test in this case, we must determine whether the distinction in Baltimore County ordinance between in-county towers and out-of-county towers is rationally related to a legitimate governmental objective." *Ibid.* There, as here, the County advanced the argument that, *inter alia,* the distinction was necessary to protect the public from

fraud, deception, and abuses. The Court found that Baltimore County's need to supervise and administer the towers was met by the comprehensive plan. The Court observed that Maryland, as does Virginia, had a statewide law with comprehensive powers to address the concerns set forth by Baltimore County. Similarly, the concerns set forth by Fairfax County with respect to its abilities to enforce their ordinance remains a red herring. See §46.2-2800 *et seq.* Code of Virginia, 1950, as amended.

In summary, the *Verzi* Court concluded: "By requiring all of its towers to be located within the county boundaries, Baltimore County has, in effect, conferred the monopoly of a profitable business upon certain Baltimore County Businesses. The location requirement . . . is wholly unrelated to any legitimate objective, and thus it violates the Equal Protection guarantees . . . of the Maryland Declaration of Rights." (construed in accordance with federal equal protection analyses) *Verzi*, supra at p. 428.

Further, the County's assertion that "enforcement of this Ordinance would fall to officials over whom the Board has no authority or control" is fallacious. First, as was pointed out in the response to the First Demurrer, §46.2-2800 *et seq.*, Code of Virginia, 1950, as amended, provides a comprehensive scheme for the enforcement of all local towing ordinances. The provisions specifically provide that towing companies that tow vehicles from Fairfax County and store them in locations outside of the County are subject to the Fairfax County Ordinance. Of course,

this makes sense; people who commit crimes in Fairfax County are apprehended in other jurisdictions and prosecuted in Fairfax County. The County's argument that it loses jurisdiction over a towing company that tows trespassing vehicles from Fairfax county and stores them in Arlington County, Loudoun County, or the City of Fairfax is without merit.

The Court in *Verzi* specifically found that Baltimore County's need to supervise and administer the towing companies was appropriately addressed and met because Maryland, as does Virginia, had a statewide law with comprehensive powers. Here, the concerns set forth by Fairfax County with respect to its ability to enforce its Ordinance are not realistic.

CONCLUSION

For the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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IN THE SUPREME COURT
OF VIRGINIA AT RICHMOND

Present: Hassell, C.J., Koontz, Kinser, Lemons, Goodwyn, and Mims, JJ., and Russell, S.J.

ADVANCED TOWING
COMPANY, LLC, ET AL.

v. Record No. 091180

FAIRFAX COUNTY BOARD
OF SUPERVISORS

OPINION BY
SENIOR JUSTICE
CHARLES S. RUSSELL
June 10, 2010

FROM THE CIRCUIT COURT
OF FAIRFAX COUNTY
Bruce D. White, Judge

This appeal challenges the validity of a county ordinance under the Equal Protection guarantee contained in the Fourteenth Amendment to the federal constitution and under the Dillon Rule. Because the case comes before us on demurrer, no facts are in dispute and the appeal presents pure questions of law. *See e.g., Dreher v. Budget Rent-A-Car Sys.*, 272 Va. 390, 395, 634 S.E.2d 324, 327 (2006) (decision whether to grant demurrer involves issues of law subject to de novo review).

Code § 46.2-1232(A) provides:

> **§ 46.2-1232. Localities may regulate removal or immobilization of trespassing vehicles.** – A. The governing body of any county, city, or town may by ordinance regulate the removal of trespassing vehicles from property by or at the direction of the owner, operator, lessee, or authorized agent

> in charge of the property. In the event that a vehicle is towed from one locality and stored in or released from a location in another locality, the local ordinance, if any, of the locality from which the vehicle was towed shall apply.

Pursuant to that section, the Fairfax County Board of Supervisors (the Board) adopted, as a part of the county code, an ordinance regulating the towing of vehicles. Section 82-5-32(e) of the ordinance provides, in pertinent part:

> "Every site to which trespassing vehicles are towed shall comply with the following requirement: (1) A tow truck operator must tow each vehicle to storage site located within the boundaries of Fairfax County. . . ."

Proceedings

Advanced Towing Company, LLC, a firm having its principal place of business in Arlington County, Roadrunner Wrecker Service, Inc., a firm having its principal place of business in Loudoun County, and King's Towing, Inc., a firm having its principal place of business in the City of Fairfax (collectively, the Towing Companies) filed a complaint for declaratory judgment in the circuit court against the Board, contending that the territorial restriction contained in the ordinance violated their Equal Protection rights secured by the federal and state constitutions.

The Towing Companies alleged that they had contractual obligations to property management

companies in Fairfax County for the removal of trespassing vehicles, that they were exposed to possible prosecution for towing vehicles to their storage lots located outside the county, that the ordinance unfairly discriminated against them and in favor of businesses located within the county, and that there was no rational basis for such discrimination.

The Board filed a demurrer, contending that the ordinance was entitled to a strong presumption of validity and that the complaint set forth no facts sufficient to overcome the presumption. The court sustained the demurrer but gave the Towing Companies leave to amend. The Towing Companies filed an amended complaint, the Board again demurred and the court again sustained the demurrer. The Towing Companies filed a motion to reconsider in which they asserted an additional ground for relief, challenging the ordinance as *ultra vires* under the Dillon Rule, contending that the ordinance exceeded the authority granted the county by the General Assembly.

The Board objected to the late assertion of the Dillon Rule, but both parties briefed and argued it before the circuit court, which considered and decided that question. The court denied the motion to reconsider, adhered to its previous rulings sustaining the Board's demurrer, and entered final judgment for the Board. We awarded the Towing Companies an appeal.

Analysis

A. Equal Protection

Respect for the separation of the powers of the legislative and judicial branches of government is an essential element of our constitutional system. *See* Va. Const. art. I, § 5 (providing that "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct"). Unless a suspect classification or a fundamental constitutional right is involved, considerable deference must be accorded by the courts to legislative policy choices.

Here, the Towing Companies and the Board agree that the ordinance does not involve any suspect classification or fundamental constitutional right. The territorial limitation under consideration does not, therefore, require heightened judicial scrutiny, but rather is subject to the most deferential standard of judicial review, the "rational basis" test. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983).

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
>
> . . . .

> [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. Beach Communications, Inc., 508 U.S. 307, 313-15 (1993).

A legislative territorial limitation does not in itself offend the Fourteenth Amendment. *Cavalier Vending Corp. v. State Bd. of Pharmacy*, 195 Va. 626, 634, 79 S.E.2d 636, 640 (1954). The courts must defer to such a legislative choice if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification. *Beach Communications*, 508 U.S. at 313. Our analysis, therefore, is limited to ascertaining whether such a state of facts could have been within the rational contemplation of the Board when framing its ordinance.

The Towing Companies point out that if the Board's concern was the convenience of owners seeking to retrieve their towed vehicles, such owners would be better served if vehicles removed from the eastern part of Fairfax County, which has an area exceeding 400 square miles, were towed to nearby Arlington County, vehicles in the western part of the county were towed to nearby Loudoun County, and vehicles towel from the central part of the county were towed to the City of Fairfax. Therefore, the Towing Companies argue, because all their storage lots are located within 5 ½ miles of the Fairfax County

line, any such basis for the territorial restriction would be irrational.

The Board points to another basis justifying the territorial limitation. The Fairfax County ordinance in question contains a number of provisions regarding the safeguarding of stored vehicles, including nighttime illumination, fencing, posted signs, and the like. The second sentence of the enabling statute, Code § 46.2-1232(A), quoted above, expressly contemplates that a locality *may* permit vehicles to be towed to another locality for storage, and provides in such event that the ordinance "of the locality from which the vehicle was towed shall apply." The Board points out that, notwithstanding that authorization, the statute makes no provision for the enforcement of any of its protective regulations in any other locality. Thus, the Board argues, the only way to ensure that its regulations are enforced is to confine the towing of vehicles to the area in which its own officers have the authority to enforce them.

The Board's argument, based entirely on the pleadings before the court on demurrer, posits a "reasonably conceivable state of facts that could provide a rational basis for the classification" made by the ordinance under review. The territorial limitation therefore survives analysis under the Equal Protection guarantee of the Fourteenth Amendment.*

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* The Towing Companies' complaint also referred to the anti-discrimination provisions of Article I, Section 11 of the

(Continued on following page)

B. The Dillon Rule

Dillon's Rule stipulates that municipal corporations have only those powers expressly granted by statute, those necessarily implied therefrom, and those that are essential and indispensable to the exercise of those expressly granted. In Virginia, a corollary rule provides that boards of supervisors of counties are similarly limited to those powers conferred expressly or by necessary implication by statute. Our cases refer to these principles collectively as the Dillon Rule. *See Arlington County Bd. v. White,* 259 Va. 708, 710 n.1, 712, 528 S.E.2d 706, 707 n.1, 708 (2000); *City of Virginia Beach v. Hay,* 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999); *Commonwealth v. Arlington County Bd.,* 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977).

Further, our cases recognize the "reasonable selection of method" rule, which permits local governing bodies to exercise discretionary authority when a statutory grant of power has been expressly made but is silent upon the mode or manner of its execution. *Arlington County Bd.,* 217 Va. at 574-75.

In the present case, the power to regulate towing is expressly granted to localities by Code § 46.2-1232(A). Although that section clearly implies that localities may permit vehicles to be towed outside

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Constitution of Virginia. Because no argument was presented to the circuit court concerning that provision, we do not consider it on appeal. Rule 5:25.

their borders, it falls far short of compelling them to do so. Subsection (B) of the statute prohibits any requirement in a local towing ordinance that a towing business engage in any business other than a towing and recovery business. Subsection (C) of the statute contains an extensive list of requirements that a local towing ordinance *may* impose on towing and recovery operators for the protection of the public, but none of those are mandatory upon the local governing bodies. All are permissive and none relate to the locations to which vehicles may be towed. *See e.g., Harper v. Virginia Dep't of Taxation,* 250 Va. 184, 194, 462 S.E.2d 892, 898 (1995) (explaining that "the word 'may' is prima facie permissive, importing discretion . . . ").

With respect to the territory within which vehicles are to be stored after being towed, the statutory grant of power to regulate towing is silent as to the manner of its execution. It follows that the localities may exercise reasonable discretion in prescribing, by ordinance, the territory within which towed vehicles shall be stored without contravening the Dillon Rule.

Conclusion

Because the circuit court correctly held that the ordinance in question did not offend the Equal Protection guarantee contained in the Fourteenth Amendment to the federal constitution and did not

contravene the Dillon Rule, we will affirm the judgment.

Affirmed

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ADVANCED TOWING COMPANY, LLC, *et al*	)	
Plaintiffs,	)	
v.	)	Case No. 2008-0011827
FAIRFAX COUNTY BOARD OF SUPERVISORS,	)	
Defendant.	)	

ORDER

THIS CAUSE came on to be heard on the 13th day of February 2009, on the Demurrer of Defendant Fairfax County Board of Supervisors ("the Board"), to the Plaintiffs' Amended Complaint, and it appearing to the Court after oral argument and consideration of the pleadings that this Cause is just and proper;

NOW THEREFORE, is it hereby ordered that the Board's Demurrer should be, and hereby is, sustained, and the Amended Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.

THIS CAUSE IF FINAL

Entered, this 13th day of February 2009.

/s/ Bruce D. White
Fairfax County
Circuit Court Judge

SEEN & OBJECTED TO THE COURT'S GRANT OF LEAVE TO AMEND & NOT DISMISSAL OF THE CASE WITH PREJUDICE.

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ADVANCED TOWING COMPANY, LLC, *et al*	)	
Plaintiffs,	)	
v.	)	Case No. 2008-0011827
FAIRFAX COUNTY BOARD OF SUPERVISORS,	)	
Defendant.	)	

ORDER

THIS CAUSE came on to be heard on the 13th day of March 2008, on the Plaintiffs' Motion to Reconsider, and it appearing to the Court after oral argument and consideration of the Pleadings that this motion should be denied.

NOW THEREFORE, is it hereby ordered that the Suspending Order entered by this Court on or about February 25, 2009, is hereby vacated; and

IT IS FURTHER ORDERED that the Plaintiff's Motion to Reconsider should be, and hereby is denied.

THIS CAUSE IS FINAL

Entered, this 13th day of February 2009.

/s/ Bruce D. White
Fairfax County
Circuit Court Judge

I ask for this:

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Docket No. 10-311

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ADVANCED TOWING COMPANY, LLC, ROADRUNNER WRECKER SERVICE, INC., and KING'S TOWING, INC.,

Petitioners,

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Virginia properly concluded that a Fairfax County Ordinance, which requires that vehicles towed from Fairfax County be taken to storage lots located within Fairfax County, is rationally related to a legitimate governmental purpose and does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal because the Petitioners have claimed a violation of their rights as protected by the Fourteenth Amendment of the United States Constitution.

INTRODUCTION

In a unanimous ruling, the Supreme Court of Virginia concluded that Fairfax County Ordinance § 82-5-32(e), which requires that trespassing vehicles be towed to a storage lot located within Fairfax County, did not run afoul of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court of Virginia affirmed the trial court's decision sustaining the County's demurrer on the pleadings on the same grounds. *Advanced Towing, et al. v. Bd. of Supervisors of Fairfax County,* ____ Va. ____, 694 S.E.2d 621 (2010).

The Petitioners are three towing companies ("the Tow Companies") that do not own, lease, or otherwise operate a storage lot within Fairfax County, Virginia. The sole reason for their petition for a writ of certiorari ("Petition") is the erroneous contention that the Supreme Court of Virginia's ruling is directly contrary to a decision of the Court of Appeals of Maryland in *Verzi v. Baltimore County, Maryland, 333 Md. 411,* 635 A.2d 967 (1994). As set forth more fully below, the *Verzi* decision does not conflict either factually or legally with the Supreme Court of Virginia's decision here. Unlike the ordinance at issue in this cause, *Verzi* involved a residency requirement, and further, it was expressly decided pursuant to the Maryland Constitution rather than the United States Constitution. There is simply no conflict between the Maryland and Virginia courts, and the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

On September 11, 2008, the Tow Companies filed a declaratory judgment action seeking to invalidate Fairfax County Code § 82-5-32(e) ("the Ordinance"), which requires that trespassing vehicles be towed to a vehicle-storage site located within Fairfax County.[1] The Tow Companies alleged that they are all located outside the Fairfax County line (J.A. at 2, ¶ 3)[2] and that the Ordinance's geographical limitation "has no rational relationship to any proper governmental objective." As such, the Tow Companies asserted, in relevant part, that the Ordinance "violates the equal protection rights of the [Tow Companies] as are secured by the Fourteenth Amendment to the Constitution of the United States." (J.A. at 3, ¶ 9.) On December 19, 2008, the Fairfax County Circuit Court ("Circuit Court"), the Honorable Bruce D. White presiding, granted the Fairfax County Board of Supervisor's ("County's") Demurrer because the Tow Companies had failed to identify any class of persons that was being treated unfairly, but gave the Tow Companies leave to amend. (J.A. at 23.)

On December 23, 2008, the Tow Companies filed an Amended Complaint, virtually identical to

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[1] Fairfax County Code § 82-5-32(e) provides in relevant part that "[e]very site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County."

[2] Citations to the record are to the Joint Appendix filed in the Supreme Court of Virginia and are cited "J.A. at [page number]."

the original Complaint, except that they expressly specified that Fairfax County Code § 82-5-32(e) "establishes an unconstitutional classification which impermissibly draws an unfair distinction between [tow companies] who have a storage facility in Fairfax County and [tow companies] who do not have a storage facility in Fairfax County." (J.A. at 26–27, ¶ 11.) On February 13, 2009, the Circuit Court sustained the County's Demurrer to the Amended Complaint and entered a Final Order because the Circuit Court concluded that County Code § 82-5-32(e) was rationally related to the administration and enforcement of the Ordinance. (J.A. at 56, 59.) The Circuit Court then issued a suspending order in response to the Tow Companies' Motion to Reconsider on grounds not before this Court.

On March 13, 2009, after accepting briefs and hearing additional argument on the Motion to Reconsider, the Circuit Court denied the Motion, properly concluding that the Ordinance was Constitutionally sound. (J.A. at 90). The Tow Companies then timely noted their appeal to the Supreme Court of Virginia, which ruled on June 10, 2010, that the Ordinance did not violate the United States Constitution. This appeal followed.

REASONS FOR DENYING THE PETITION

I. The Maryland Court of Appeals' *Verzi* Decision Does Not Conflict with the Decision of the Supreme Court of Virginia.

There is no merit to the Tow Companies' assertion that "[t]he decision of the Supreme Court of

Virginia is in direct conflict" with the Court of Appeals of Maryland in *Verzi v. Baltimore County,* 635 A.2d 967, (Md. 1994), or that the two cases are "factually indistinguishable." (Pet. at 6-7)[3]. First, despite the Tow Companies' unsupported assertion to the contrary, the Ordinance at issue in this matter is not a residency requirement. Unlike the ordinance at issue in *Verzi,* nothing in the Ordinance requires, mandates, or otherwise compels the Tow Companies to be citizens or residents of Fairfax County. The Tow Companies may have principal offices located in other counties, other states, or even other countries. They must, however, tow any trespassing vehicles to a storage facility located within Fairfax County. Nothing in the Ordinance, however, precludes these companies from owning such a lot, leasing one or making whatever arrangements necessary to tow vehicles to such a lot. This "location" requirement for storage lots, however, is not "essentially" a residency requirement for their operators. Pet. at 7. And it does not become a "residency requirement" merely because the Tow Companies have labeled it as such.

The Tow Companies also wholly ignore the fact that the Maryland Court of Appeals expressly concluded in *Verzi* that its decision was not based on any federal constitutional claims. *Verzi*, 635 A.2d at 975, n.4. Rather, it determined only that "[b]y requiring all of its towers [sic] to be located within the county boundaries, Baltimore County . . . violates the Equal Protection guarantees of Article 24 of the *Maryland Declaration of Rights*." (Emphasis added.)

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[3] Citations to the Petition for Writ of Certiorari are cited as "Pet. at [page number]."

As such, it is incomprehensible how the Petitioners can state that the two cases are "indistinguishable." Pet. at 7.

II. The Supreme Court of Virginia Properly Concluded that the Ordinance Does Not Violate the Equal Protection Clause of the United States Constitution Because it is Rationally Related to Legitimate Governmental Purposes.

The Tow Companies' argument that their Petition must be granted because there is a "direct conflict" between the Maryland and Virginia courts' attempts to hide the greater weakness of their case: namely, that the Supreme Court of Virginia properly concluded that the Ordinance furthers a legitimate governmental purpose, and as such, it must survive an Equal Protection challenge.

The Amended Complaint specifies only that the Fairfax County Code "establishes an unconstitutional classification which impermissibly draws an unfair distinction between [towing companies] who have a storage facility in Fairfax County and [towing companies] who do not have a storage facility in Fairfax County." (J.A. at 26-27.) The Tow Companies do not allege that the Ordinance involves any suspect classification or fundamental right, and thus, the Ordinance is subject to the most deferential review under the "rational basis" test. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, 196 (1983). This test compels judicial restraint.

> [E]qual protection is not a license for courts to judge the wisdom, fairness,

> or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.
>
> . . . . [A] legislative choice is *not subject to courtroom fact finding* and may be based on *rational speculation unsupported by evidence or empirical data*.

Fed. Commc'n Comm'n v. Beach Commc'n, Inc., 508 U.S. 307, 313-315 (1993) (emphasis added).

Here, the sole basis for the Tow Companies' equal protection challenge is that towing companies without a storage lot in Fairfax County suffer "adverse economic consequences" not shared by towing companies that do have a storage facility in Fairfax County. (J.A. at 27.) This allegation, even if true, does not come close to overcoming the rational basis test outlined in *Beach Communications*, and the Supreme Court of Virginia properly affirmed the trial court's demurrer.

A. The Tow Companies' Amended Complaint Failed To Name An Improper Classification or Articulate Harms That Rebut The Ordinance's Strong Presumption Of Constitutionality.

The Amended Complaint rests solely on the contention that the Ordinance makes an unfair distinction between towing companies that have a storage lot in Fairfax County and those that do not. (J.A. at 26-27.) A review of the Ordinance, however, reveals that it makes no such distinction; it merely provides that "[a] tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County." Fairfax County Code § 82-5-32(e). The Ordinance does not preclude the Tow Companies from obtaining or using a tow lot in Fairfax County. Nor does the Ordinance discriminate against the Tow Companies. They are just as able as other tow truck operators to use a tow lot in Fairfax County. *See Cavalier Vending Corp. v. State Bd. of Pharmacy,* 195 Va. 626, 634, 79 S.E.2d 636, 640 (1954) (holding that statute requiring contraceptive devices to be sold in pharmacies did not discriminate against vending machine operators because operators were still free to sell such devices within the regulatory framework).

Even assuming, *arguendo,* that the Ordinance makes a distinction among tow truck operators, this distinction, by itself, is not unconstitutional. To some extent, all laws make distinctions among persons or activities. *See Cavalier Vending Corp.*, 195 Va. at 634, 79 S.E.2d at 640 (holding that equal protection is not implicated by either legislation that

is limited "in the objects to which it is directed, or by the territory within which it is to operate.")

Here, the Tow Companies contend that the Ordinance imposes upon them "adverse economic consequences" not suffered by those who do have storage lots within Fairfax County. (J.A. at 27; Am. Compl. ¶12.) This type of economic impact, even if true, does not equate to an unconstitutional burden. Indeed, even in the context of heightened scrutiny, economic burdens placed on the free exercise of religion are constitutionally permissible. *See, e.g., Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303, 307 (6th Cir. 1983). In short, the Tow Companies' allegations fail to overcome the strong presumption of constitutionality afforded the Ordinance.

B. The Ordinance Survives A Constitutional Challenge Even At Demurrer Because It Is Conceivable That The Ordinance Is Rationally Related To Legitimate Governmental Interests.

Under the rational basis test, it is well-settled that at the demurrer stage of proceedings a court may engage in "rational speculation" to support the constitutionality of legislation. *Finn v. Va. Ret. Sys.* 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000). Indeed, the court's support of a legislative choice is not subject to "courtroom factfinding," and need not be based upon "evidence or empirical data." *Id.* at 155, 524 S.E.2d at 131.

Not only is a court permitted to completely speculate and theorize how legislation may be supported, but the Petitioners had the burden to negate "every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). In this regard, the Tow Companies' challenge to the Ordinance cannot succeed.

In this case, it is certainly *conceivable* that the Ordinance's geographical limitation is rationally related to the County's ability to administer and enforce its various towing regulations. *See* Fairfax County Code § 82-5-32(e) (setting forth a variety of regulations regarding vehicle storage facilities, such as illumination requirements and posted signage, among others). Although Va. Code Ann. § 46.2-1232 (2010) provides that the County's regulations would be applied in the locality to which the vehicle is towed, the statute does not give Fairfax County officials the authority to enforce any of its towing regulations outside the jurisdictional limits of Fairfax County.

The Petitioners' assertion that this argument is "without merit," ignores existing law. Pet. at 9. The County simply has no authority to enforce its regulations governing vehicle-storage facilities in other localities. *See, e.g.*, Va. Code Ann. § 15.2-1724 (Supp. 2010) (setting forth the limited circumstances when a locality's police officers may go beyond the territorial limits of that locality; enforcement of a towing ordinance is not among the enumerated circumstances). Rather, the enforcement of the County's ordinances in this arena will be essentially left up to the discretion of enforcement officials in the

localities to which the vehicle is towed. *See* Va. Code Ann. § 46.2-1232(A) (2010) (providing that if a vehicle is towed to another locality, the ordinance of the locality from which the vehicle was towed shall apply).

Nor does the legislative scheme set out in Va. Code Ann. §§ 46.2-2800 through 2828 salvage the Petitioners' argument. Their assertion that the newly established Board of Towing and Recovery Operators ("BTRO") "provides a comprehensive scheme for the enforcement of all local towing ordinances" is simply wrong.[4] Pet. at 8. The BRTO has no such authority. *See* Va. Code Ann. § 46.2-2805 (2010) (setting forth the powers of the BTRO, which relate primarily to the licensure of towing operators). In fact, Va. Code Ann. § 46.2-2828 (2010) expressly provides that the BTRO has limited authority over local ordinances. *See* Va. Code. Ann. § 46.2-2828 (providing that "[i]n the event of a conflict between an action of the Board and any ordinance adopted by [a locality], . . . the *provisions of such local ordinance shall be controlling.*") (emphasis added).

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[4] It should also be noted that *Verzi* is further distinguishable from this case because although Maryland may have a "statewide law with comprehensive powers" such that it is able to "supervise and administer the towing companies," that regime has not been replicated in Virginia. In the *Verzi* decision, the Court of Appeals of Maryland expressly held that Baltimore County officials had regulatory and criminal enforcement power that extended beyond county boundaries. 635 A.2d at 974. Fairfax County officials simply do not have such enforcement power.

Given that the Ordinance directly furthers Fairfax County's ability to administer and enforce its towing regulations, the Supreme Court of Virginia properly concluded that the Ordinance survives an equal protection challenge. *See also, Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 623-24 (1961).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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